

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

ROBERT G. MARCELLUS, <i>et al.</i>)	
)	
Plaintiffs,)	
v.)	Case No. 3:15-cv-00481
)	
VIRGINIA STATE BOARD OF ELECTIONS, <i>et al.</i>)	
)	
Defendants.)	

ANSWER AND DEFENSES

Pursuant to Fed. R. Civ. P. 8, Defendants the Virginia State Board of Elections and each of its members (James B. Alcorn, Clara Belle Wheeler, and Singleton McAllister, in their official capacities as Chairman, Vice-Chairman, and Secretary, respectively) (collectively, the Commonwealth) hereby respond as follows to the claims and allegations in the Complaint.

ANSWER

1. Paragraph 1's descriptions of this case are legal conclusions to which no factual response is required. Va. Code § 24.2-613 speaks for itself and any allegations in paragraph 1 about that statute that are inconsistent with it are denied. The Commonwealth denies that Va. Code § 24.2-613 is inconsistent with the United States Constitution. The Commonwealth denies that Plaintiffs have a right to demand that the Commonwealth print candidate party affiliations or designations, or any other message, on the official ballot for the November 3, 2015 (or any other) general election.

Jurisdiction and Venue

2. Subject matter jurisdictional allegations are legal conclusions to which no factual response is required. The Commonwealth denies that Va. Code § 24.2-613 deprives Plaintiffs, or

anyone else, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

3. Venue allegations are legal conclusions to which no factual response is required. The Commonwealth does not contest venue in this Court.

Parties

4. Upon information and belief, the Commonwealth admits that Plaintiffs Marcellus, Williams, Hodge, and Gresham are Powhatan residents that were nominated on May 21, 2015 as Republican candidates for the Powhatan Board of Supervisors in single-member districts. The Commonwealth lacks knowledge or information sufficient to form a belief about the truth of allegations concerning the nature, membership, and actions of the Powhatan County Republican Committee and about whether the Committee's actions are authorized by the Plan of Organization of the Republican Party of Virginia.

5. The Commonwealth admits that the State Board of Elections is an agency of the Commonwealth of Virginia established and given certain administrative, enforcement, and other duties and powers by Virginia statutes, including but not limited to Va. Code § 24.2-102.

6. Admitted.

Facts

7. The Commonwealth admits the first sentence of paragraph 7 of the Complaint. The Commonwealth lacks knowledge or information sufficient to form a belief about the truth of the second sentence's specific allegations concerning residency, voting qualification, and local filings of the individual Plaintiffs. The statutes cited in paragraph 7 speak for themselves, and any allegations inconsistent with those statutes are denied.

8. The Commonwealth admits that each of the individual Plaintiffs were nominated by the Republican Party in Powhatan County. The Commonwealth admits that the individual Plaintiffs will appear on the official ballot for the November 3, 2015 general election. The Commonwealth lacks knowledge or information sufficient to form a belief about the truth of specific allegations as to the method of nomination used by the Republican Party and whether such method of nomination is consistent with the Republican Party's rules. The statutes cited in paragraph 8 speak for themselves, and any allegations inconsistent with those statutes are denied.

9. Admitted. The statute cited in paragraph 9 speaks for itself, and any allegations inconsistent with that statute are denied.

10. The Commonwealth admits that Brooks C. Braun, a Policy Analyst at the Virginia Department of Elections, sent the August 3, 2015 (11:35 am) email message included in Exhibit 1 to the Complaint. The Commonwealth denies any suggestion that Braun's use of "Esq." following his name permits him to provide legal advice to or on behalf of an agency of the Commonwealth, including the State Board of Election or the Department of Elections. The Commonwealth denies that Braun was acting as an attorney in sending that email or in any other respect relevant to this case. The Commonwealth admits that official ballots for the November 3, 2015 general election (and all other general elections) will not include a party identification or designation for candidates for Board of Supervisors, pursuant to Va. Code § 24.2-613. The Commonwealth lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 10 of the Complaint.

Count 1

11. The preceding responses to allegations are incorporated here by reference.

12. The First and Fourteenth Amendments speak for themselves, and any allegations

inconsistent with those amendments (including as they have been interpreted and applied) are denied. The Commonwealth denies that the First and Fourteenth Amendments provide Plaintiffs with the rights they claim in this case.

13. The First and Fourteenth Amendments speak for themselves, and any allegations inconsistent with those amendments (including as they have been interpreted and applied) are denied. The Commonwealth denies that the First and Fourteenth Amendments provide Plaintiffs with the rights they claim in this case.

14. Denied.

15. Denied.

16. Denied.

Count 2

17. The preceding responses to allegations are incorporated here by reference.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. The Commonwealth denies that Plaintiffs are entitled to entry of judgment in their favor or to any relief, including the relief requested in the Complaint.

24. Only those allegations specifically admitted above are admitted. The Commonwealth denies any remaining allegations in the Complaint to which responses are required.

AFFIRMATIVE DEFENSES

1. Any relief with respect to the November 3, 2015 general election is barred by laches. Moreover, none of the four factors for preliminary injunctive relief favor awarding such relief to Plaintiffs. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008); *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds* by 559 U.S. 1089 (2010) and *reissued in pertinent part* by 607 F.3d 355 (4th Cir. 2010).

2. Plaintiffs do not assert a claim that merits any relief. The First and Fourteenth Amendments do not give Plaintiffs a right to demand that the Commonwealth print candidate party affiliations or designations, or any other message, on the official ballot for the November 3, 2015 (or any other) general election. Legitimate, reasonable, and important regulatory interests justify distinguishing between local offices on the one hand, and federal, statewide, and General Assembly offices on the other, with respect to the printing of candidate party affiliations or designations on the ballot.

Respectfully submitted,

VIRGINIA STATE BOARD OF ELECTIONS
JAMES B. ALCORN
CLARA BELLE WHEELER
SINGLETON MCALLISTER

By: /s/ - Joshua D. Heslinga
Counsel

Mark Herring
Attorney General of Virginia

Cynthia E. Hudson
Chief Deputy Attorney General

John W. Daniel II
Deputy Attorney General, Commerce, Environment and Technology Division

Heather Hays Lockerman
Senior Assistant Attorney General, Chief, Financial Law & Government Support Section

Joshua D. Heslinga (VSB # 73036)
Assistant Attorney General
jheslinga@oag.state.va.us

Anna T. Birkenheier (VSB # 86035)
Assistant Attorney General
abirkenheier@oag.state.va.us

Attorneys for the Virginia State Board of Elections and its members in their official capacities

Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219
(804) 786-3847
fax: (804) 692-1647

CERTIFICATE OF SERVICE

I certify that, on September 24, 2015, I am filing the foregoing document with the Clerk of Court using the CM/ECF system, which will serve such filing on counsel of record:

Patrick M. McSweeney
McSWEENEY, CYNKAR & KACHOUROFF, PLLC
3358 John Tree Hill Road
Powhatan, Virginia 23139
TeL (804) 937-0895
patrick@mck-lawyers.com
Counsel for Plaintiffs

/s/
Joshua D. Heslinga (VSB # 73036)
*Attorney for the Virginia State Board of Elections
and its members in their official capacities*
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219
(804) 786-3847
fax: (804) 692-1647
jheslinga@oag.state.va.us